5

5-23-08

No. 07-373

In the Supreme Court of the United States

CLARK COUNTY, NEVADA, PETITIONER

v.

VACATION VILLAGE, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

D.J. GRIBBIN
General Counsel

PAUL M. GEIER
Assistant General Counsel for Litigation

DALE C. ANDREWS
Deputy Assistant General Counsel for Litigation

KERRY B. LONG
Chief Counsel

MARC WARREN
Deputy Chief Counsel for Operations
Federal Aviation Administration
Department of Transportation
Washington, D.C. 20590

PAUL D. CLEMENT
Solicitor General
Counsel of Record

RONALD J. TENPAS
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

MALCOLM L. STEWART
Assistant to the Solicitor General

KATHERINE J. BARTON
KATHRYN E. KOVACS
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Respondents are the former owners of land near McCarran International Airport in Nevada. They filed suit against petitioner, the airport operator. Respondents contended that newly-enacted restrictions on the height of structures that could be erected on their property, designed to facilitate the use of airspace above their land for takeoff and landing of aircraft, constituted a taking of their property that required the payment of just compensation. The court of appeals held that the restrictions did not effect a compensable taking under federal standards, but that respondents had established a compensable taking under Nevada law, and that federal aviation statutes do not preempt that state-law compensation requirement. The question presented is as follows:

Whether federal law preempts the state-law award of just compensation ordered by the court of appeals in this case.

TABLE OF CONTENTS

Page

Statement 1
Discussion 7
A. States are generally free to accord protections under their state constitutions that are more extensive than the federal Constitution requires 7
B. Petitioner's broad preemption theory cannot be reconciled with this Court's decision in *Jankovich* 9
C. Although state-law restrictions on airport zoning might under some circumstances raise significant preemption concerns, this case is not a suitable vehicle for determining the applicable limits on state authority 13
D. Petitioner has failed to demonstrate that the state-law compensation requirement applied in this case will disrupt the federal aviation regime 18
Conclusion 23

TABLE OF AUTHORITIES

Cases:

AOPA v. *FAA*, 600 F.2d 965 (D.C. Cir. 1979) 3
Braniff Airways, Inc. v. *Nebraska State Bd. of Equalization & Assessment*, 347 U.S. 590 (1954) 12
Brown v. *Legal Found.*, 538 U.S. 216 (2003) 16, 17
Cooper v. *California*, 386 U.S. 58 (1967) 8
Danforth v. *Minnesota*, 125 S. Ct. 1029 (2008) 8
Delaware v. *Prouse*, 440 U.S. 648 (1979) 8

Cases—Continued: Page

Geier v. *American Honda Motor Co.*, 529 U.S. 861 (2000) 9
Griggs v. *Allegheny County*, 369 U.S. 84 (1962) 2
Indiana Toll Rd. Comm'n v. *Jankovich*, 237 N.E.2d 237 (Ind. 1963) 9
Jankovich v. *Indiana Toll Rd. Comm'n*, 379 U.S. 487 (1965) ..... *passim*
Kelo v. *New London*, 545 U.S. 469 (2005) 8
Loretto v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) 6
McCarran Int'l Airport v. *Sisolak*, 137 P.3d 1110 (Nev. 2006), cert. denied, 127 S. Ct. 1260 (2007) ..... *passim*
Michigan v. *Long*, 463 U.S. 1032 (1983) 8
Skysign Int'l, Inc. v. *City & County of Honolulu*, 276 F.3d 1109 (9th Cir. 2002) 12
United States v. *Causby*, 328 U.S. 256 (1946) 2
United States v. *Locke*, 529 U.S. 89 (2000) 9
Vorhees v. *Naper Aero Club, Inc.*, 272 F.3d 398 (7th Cir. 2001) 12
Wainwright v. *Goode*, 464 U.S. 78 (1983) 7, 8

Constitution, statutes and regulations:

U.S. Const. Amend. V (Just Compensation Clause) ... 8, 19
Air Commerce Act of 1926, Pub. L. No. 69-254, 44 Stat. 568:
§ 6, 44 Stat. 572 1
§ 10, 44 Stat. 574 ..... 1, 2

Statutes and regulations—Continued: Page

Federal Aviation Act of 1958, Pub. L. No. 85-726, § 101(24), 72 Stat. 739 2
Federal Airport Act Amendments of 1964, Pub. L. No. 88-280, § 10(1), 78 Stat. 161 10
49 U.S.C. 40102(a)(32) (Supp. V 2005) 2, 11, 13
49 U.S.C. 40103(a)(1) 2, 11, 12
49 U.S.C. 40103(a)(2) 2, 11, 13
49 U.S.C. 40116(b) 15
49 U.S.C. 47101(a)(8) 3
49 U.S.C. 47107(a)(9) 3
49 U.S.C. 47107(a)(10) 3, 18
49 U.S.C. 47110(c)(1) 3, 19
49 U.S.C. 44718 2
49 U.S.C. 44718(b) 3
14 C.F.R. 77.13 2
14 C.F.R. 77.35(c) 3
14 C.F.R. 91.119(b) 2
14 C.F.R. 91.119(c) 2

Miscellaneous:

FAA Advisory Circular:
No. 150/5190-4A, *A Model Zoning Ordinance to Limit Height of Objects Around Airports* (Dec. 14, 1987) <http://www.faa.gov/airports_airtraffic/airports/resources/advisory_circulars/media/150-5190-4A/150_5190_4A.pdf> 19, 20

Miscellaneous—Continued: Page

No. 150/5100-17, *Land Acquisition and Relocation Assistance for Airport Improvement Program (AIP) Assisted Projects* (Nov. 7, 2005) <http://www.faa.gov/airports_airtraffic/airports/resources/advisory_circulars/media/150-5100-17/150_5100_17_chg6.pdf> 21

FAA, U.S. Dep't of Transp., Order 5100.38C Airport Improvement Program Handbook (June 28, 2005) <http://www.faa.gov/airports_airtraffic/airports/resources/publications/orders/media/aip_5100-38c.pdf> 19

In the Supreme Court of the United States

No. 07-373

CLARK COUNTY, NEVADA, PETITIONER

v.

VACATION VILLAGE, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

1. a. In the Air Commerce Act of 1926 (ACA), ch. 344, § 6, 44 Stat. 572, Congress "declare[d] that the Government of the United States has, to the exclusion of all foreign nations, complete sovereignty of the airspace over the lands and waters of the United States, including the Canal Zone." The ACA further stated that "navigable airspace shall be subject to a public right of freedom of interstate and foreign air navigation." *Id.* § 10, 44 Stat. 574. Federal law currently provides that "[t]he United States Government has exclusive sovereignty of

airspace of the United States," 49 U.S.C. 40103(a)(1), and that citizens of the United States have "a public right of transit through the navigable airspace," 49 U.S.C. 40103(a)(2).

Congress originally defined the term "navigable airspace" as "airspace above the minimum safe altitudes of flight prescribed by the Secretary of Commerce." ACA § 10, 44 Stat. 574; see *United States* v. *Causby*, 328 U.S. 256, 263 (1946). In *Causby*, this Court held that "navigable airspace" as so defined did not extend downward to include the "path of glide"—*i.e.*, the path of an airplane to or from the ground during landing or takeoff. *Ibid.*; see *Griggs* v. *Allegheny County*, 369 U.S. 84, 88 (1962). Congress subsequently amended the definition of "navigable airspace" to include "airspace needed to insure safety in take-off and landing of aircraft." Federal Aviation Act of 1958, Pub. L. No. 85-726, § 101(24), 72 Stat. 739; see *Griggs*, 369 U.S. at 88; 49 U.S.C. 40102(a)(32) (Supp. V 2005) (current definition of "navigable airspace"). Federal regulations have long specified the "minimum safe altitudes" for flight as 1000 feet above the highest obstacle in congested areas and 500 feet above the surface in other areas. 14 C.F.R. 91.119(b) and (c). No federal regulation defines the scope of the "navigable airspace" that is "needed to ensure safety in the takeoff and landing of aircraft." 49 U.S.C. 40102(a)(32) (Supp. V 2005).

b. Persons who propose "construction, alteration, establishment, or expansion" of a structure more than 200 feet above ground level or within a specified proximity to an airport must notify the Federal Aviation Administration (FAA). See 49 U.S.C. 44718; 14 C.F.R. 77.13. Upon receipt of such notice, the FAA conducts an aeronautical study "to decide the extent of any adverse

impact on the safe and efficient use of the airspace." 49 U.S.C. 44718(b). The FAA then issues "a determination as to whether the proposed construction or alteration would be a hazard to air navigation." 14 C.F.R. 77.35(c). Those "hazard determinations" are advisory and have no legally enforceable effect. See *AOPA* v. *FAA*, 600 F.2d 965, 966 (D.C. Cir. 1979). The FAA does not have the legal authority to prohibit construction that it deems a hazard to air navigation. *Id.* at 967.

Rather, under the federal statutory scheme, airport operators (like the local governmental unit that is the petitioner in this case) are responsible for preventing hazards to airport operations. Federal law seeks "to ensure that nonaviation usage of the navigable airspace be accommodated but not allowed to decrease the safety and capacity of the airspace and airport system." 49 U.S.C. 47101(a)(8). Accordingly, recipients of federal airport development grants must provide written assurance that they will take "appropriate action" to ensure that airspace needed for airport operations "will be cleared and protected by mitigating existing, and preventing future, airport hazards." 49 U.S.C. 47107(a)(9). Grant recipients must also promise that "appropriate action, including the adoption of zoning laws, has been or will be taken to the extent reasonable to restrict the use of land next to or near the airport to uses that are compatible with normal airport operations." 49 U.S.C. 47107(a)(10). Grant recipients are authorized to use federal funds to acquire "property interests in land or airspace." 49 U.S.C. 47110(c)(1).

2. Since the 1940s, petitioner Clark County has operated what is now known as McCarran International Airport (McCarran) and has used its zoning laws to regulate use of the surrounding land and airspace. Pet.

App. 4a, 42a. In 1964, respondents purchased a parcel of land approximately 2600 feet from the end of one of the airport's runways. *Id.* at 4a, 36a. In 1981, petitioner enacted Ordinance 728, which limited the height of structures near the airport using a slope of twenty feet outward for every foot upward (which the parties refer to as a "'20:1' slope surface"). *Id.* at 5a. On respondents' parcel, Ordinance 728 limited buildings to between 74 and 104 feet above ground level. *Id.* at 42a. In 1988, petitioner granted respondents a permit "to construct and maintain a 501-room, two-story hotel, and an 85,000-square foot casino." *Id.* at 6a. Respondents' plans included a sign 80 feet high, a casino 47 feet high, five hotel buildings 28 feet high, and three hotel buildings 76 feet high. *Id.* at 39a.

Subsequently, however, petitioner proposed to change the runway nearest respondents' parcel to allow for precision instrument approach, which necessitated lowering the slope of the approach path from 20:1 to 50:1. Pet. App. 40a. In January 1990, the FAA determined that respondents' planned construction would constitute a hazard to air navigation in light of the lowered approach path. *Id.* at 6a. Respondents agreed to lower the height of their project to 38 feet, and the FAA determined in June 1990 that the project as described in the revised proposal "would not adversely affect the safe and efficient use of navigable airspace." *Ibid.*; see *id.* at 41a. In July 1990, petitioner enacted Ordinance 1221, which imposed height restrictions using a 50:1 slope in the instrument runway approach zone and had the effect of limiting structures on respondents' parcel to between five and 25 feet above ground level. *Id.* at 6a, 42a. Ordinance 1221 also provided, however, that structures up to 35 feet were allowed in any zone. *Id.* at 42a.

3. a. In December 1993, respondents filed suit against petitioner in Nevada state court. Pet. App. 7a. Respondents' complaint alleged, inter alia, that Ordinance 1221 effected an inverse condemnation of the airspace above their tract. *Ibid.* In 1997, respondents filed in federal court a petition for bankruptcy under Chapter 11, listing their inverse-condemnation claim against petitioner as a contingent and unliquidated claim of the estate. *Ibid.* Respondents subsequently removed their takings claims to the federal bankruptcy court. *Id.* at 8a.

Following a bench trial, the bankruptcy court entered judgment for respondents, awarding them $4,886,779 plus interest, costs, and fees for the taking of airspace "between the 20:1 approach and the lower 50:1 precision instrument approach path instituted after the airport expansion." Pet. App. 27a. The court based the award on its conclusion that respondents' parcel was worth $10.00 per square foot before the enactment of Ordinance 1221 and $5.50 afterwards, and by multiplying the $4.50 per-square-foot difference by the tract's total area (1,085,951 square feet). *Ibid.* The district court subsequently entered judgment for respondents in a total amount (including fees and interest) of $10,121,686. *Id.* at 9a.

b. While petitioner's appeal was pending in the Ninth Circuit, the Nevada Supreme Court issued its decision in *McCarran Int'l Airport* v. *Sisolak*, 137 P.3d 1110 (2006), cert. denied, 127 S. Ct. 1260 (2007). As in the instant case, the plaintiff in *Sisolak* contended that height restrictions imposed by petitioner under Ordinance 1221 and a related Ordinance 1599 to facilitate takeoffs and landings at McCarran effected a taking of property that required the payment of just compensa-

tion. The Nevada Supreme Court agreed, concluding that, "[b]ecause the height restriction ordinances authorize airplanes to make a permanent, physical invasion of the landowner's airspace, * * * a *Loretto*-type regulatory per se taking occurred, requiring an award of just compensation." *Id.* at 1114 (footnote omitted) (citing *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)).

The Nevada Supreme Court in *Sisolak* stated that, for purposes of federal constitutional analysis under *Griggs*, "although airplanes may fly below 500 feet when necessary for takeoff and landing, this right does not divest the property owner of his protected property right to his usable airspace. Rather, a landowner may still make a claim for compensation for the government's use of that airspace." 137 P.3d at 1119 (footnotes omitted). The court further concluded that under Nevada law, landowners "hold a property right in the usable airspace above their property up to 500 feet." *Id.* at 1120. The court held that the ordinances effected a taking under both the federal and state constitutions. See *id.* at 1120, 1124, 1126-1127. The state court accordingly affirmed a jury verdict under which just compensation had been computed by subtracting the value of the property after the height restrictions were imposed under Ordinances 1221 and 1599 from the value of the land prior to adoption of those ordinances. See *id.* at 1118, 1127-1128, 1130.

4. Relying on the Nevada Supreme Court's decision in *Sisolak*, the court of appeals in this case held that Ordinance 1221 had effected a taking of respondents' property under Nevada law. Pet. App. 1a-25a. The Ninth Circuit "respectfully disagree[d]" with the *Sisolak* court's "interpretation of federal takings jurispru-

dence," and it concluded that "[n]o Fifth Amendment taking of [respondents'] property occurred." *Id.* at 18a. The court held, however, that it was bound by the Nevada Supreme Court's interpretation of the state constitution. *Id.* at 18a-19a. Relying on *Jankovich* v. *Indiana Toll Road Comm'n*, 379 U.S. 487 (1965), the court rejected petitioner's contention that the state-law compensation requirement announced in *Sisolak* was preempted by federal statutes governing aviation. Pet. App. 19a-20a.

The court of appeals further held that the district court's calculation of just compensation was premised on an interpretation of certain avigation easements that was inconsistent with *Sisolak*'s treatment of comparable easements under state law. Pet. App. 22a. Accordingly, the court vacated the judgment and remanded for reconsideration of the just-compensation award in light of *Sisolak*. *Id.* at 25a. The court explained that, under *Sisolak*, "just compensation is measured by the fair market value of the condemned property," which in turn is "determined by reference to the highest and best use for which the land is available," so long as "the highest and best use [is] 'reasonably probable,'" considering zoning ordinances that would be taken into account by a prudent and willing buyer. *Id.* at 22a-23a (quoting *Sisolak*, 137 P.3d at 1128).

DISCUSSION

A. States Are Generally Free To Accord Protections Under Their State Constitutions That Are More Extensive Than The Federal Constitution Requires

As a general matter, "the views of the State's highest court with respect to state law are binding on the federal courts," including on this Court. *Wainwright* v. *Goode*,

464 U.S. 78, 84 (1983) (per curiam). A narrow exception to that rule applies if the state court's interpretation of state law reflects the perception that federal law compels that reading. See, *e.g.*, *Michigan* v. *Long*, 463 U.S. 1032, 1038 n.4 (1983) (per curiam); *Delaware* v. *Prouse*, 440 U.S. 648, 652-653 (1979); Pet. App. 18a. In this case, however, the court of appeals found that the Nevada Supreme Court's state-law ruling in *Sisolak* provided an independent ground of decision and was not based on the perceived compulsory force of federal takings precedents. See *id.* at 18a-19a. Petitioner does not challenge that aspect of the Ninth Circuit's decision.

A State ordinarily "may grant its citizens broader protection than the Federal Constitution requires by enacting appropriate legislation or by judicial interpretation of its own Constitution." *Danforth* v. *Minnesota*, 128 S. Ct. 1029, 1046 (2008); see, *e.g.*, *Cooper* v. *California*, 386 U.S. 58, 62 (1967). The takings context is no exception. Indeed, this Court has recognized that a State may impose limits on takings of private property by local governments that are stricter than the limits established by the Fifth Amendment. See *Kelo* v. *New London*, 545 U.S. 469, 489 & nn.22-23 (2005). Consistent with those decisions, petitioner recognizes (Pet. 18) that "States may generally afford greater constitutional protection to property rights than the federal constitution does."

Petitioner contends, however, that this general rule is inapplicable to local ordinances that are designed to prevent obstructions to "navigable airspace" as defined in federal law. In petitioner's view, federal aviation statutes broadly preempt state authorities from requiring compensation in this setting except where compensation is required by the Fifth Amendment. See, *e.g.*, Pet. 14,

17, 18, 26. While Congress presumably could enact statutes expressly adopting this relatively complicated rule for preemption of state takings law, petitioner does not contend that Congress has done so. Rather, petitioner relies on principles of implied conflict preemption, under which federal law preempts state law where compliance with both federal and state law is impossible or where state law poses an obstacle to accomplishing the full purposes and objectives of Congress as expressed in a statute. See, *e.g.*, *United States* v. *Locke*, 529 U.S. 89, 109 (2000); *Geier* v. *American Honda Motor Co.*, 529 U.S. 861, 873 (2000). For the reasons that follow, petitioner's arguments lack merit.

B. Petitioner's Broad Preemption Theory Cannot Be Reconciled With This Court's Decision In *Jankovich*

1. In *Jankovich*, this Court considered a landowner's challenge to a municipal ordinance that, by restricting the height of structures on land near an airport, precluded the operation of the plaintiff's raised toll road. See 379 U.S. at 488. The Indiana Supreme Court held that the ordinance was invalid because it "purported to authorize an unlawful and unconstitutional appropriation of property rights without payment of compensation." *Id.* at 489 (quoting *Indiana Toll Rd. Comm'n* v. *Jankovich*, 237 N.E.2d 237, 242 (Ind. 1963)). That holding was based in part on the state court's holding that Indiana landowners "have a protected property interest in the airspace above their land." *Id.* at 490; see *id.* at 490-491.

This Court dismissed the writ of certiorari as improvidently granted, holding that the Indiana Supreme Court's ruling rested on an independent and adequate state ground because it was based in part on the Indiana

constitution. *Jankovich*, 379 U.S. at 489-492. The Court rejected the municipality's contention "that the state ground of decision is not *adequate* because it is inconsistent with the policy of the Federal Airport Act." *Id.* at 492. The Court recognized that a then-recent amendment to the Airport Act required airport authorities to take "appropriate action, *including the adoption of zoning laws*," to restrict uses of adjacent land that would impede aircraft takeoffs and landings. *Id.* at 494 (quoting the Federal Airport Act Amendments of 1964, Pub. L. No. 88-280, § 10(1), 78 Stat. 161). It observed, however, that the FAA, in implementing that requirement, had allowed airport operators to prevent such hazards *either* by acquiring easements or other interests in adjacent land, *or* by adopting zoning ordinances. *Ibid.* The Court "conclude[d] that the decision of the Supreme Court of Indiana in this case is compatible with the congressional policy embodied in the Federal Airport Act." *Id.* at 494-495.[1]

---

[1] As the Court in *Jankovich* explained, its preemption analysis was consistent with the position of the United States in that case. See 379 U.S. at 494. The United States' amicus memorandum, while disagreeing with the Indiana Supreme Court's analysis of federal constitutional law, explained (at 2 n.1):

> [W]e note our disagreement with petitioner's argument that the State ground of decision was not *adequate* because a State law forbidding airport height-limitation zoning would in any event violate the Supremacy Clause (Pet. Br. 53-56). It may be true, as petitioners argue, that the Federal Airport Act assumes that "local power to zone exists," but the form of assurance completed by the grantee in this respect carefully requires only that it act "[i]nsofar as it is within its power" (Pet. Br. 28). There is no basis for a contention that federal law removes State law restrictions on the exercise of the zoning power or defeats any State law right to compensation.

As the court of appeals recognized (Pet. App. 19a-20a), petitioner's broad theory of preemption cannot be reconciled with this Court's decision in *Jankovich*. If (as petitioner contends) a State's power in this area were limited to height restrictions that effected a federal taking, this Court could not have concluded that the state court's takings analysis was "compatible with the congressional policy embodied in the Federal Airport Act," *Jankovich*, 379 U.S. at 495, while simultaneously "express[ing] no opinion * * * regarding the validity under the United States Constitution of the city's airport zoning ordinance," *id.* at 495 n.3. The decision in *Jankovich* clearly reflects a determination by this Court that States have at least some authority to require compensation for airport-area height restrictions that would not necessarily effect a taking under federal law.

2. Petitioner observes (Pet. 25) that the Court in *Jankovich* did not address the possible preemptive effect of the federal statutory provisions on which petitioner principally relies—*viz.*, 49 U.S.C. 40102(a)(32) (Supp. V 2005), which defines the "navigable airspace" to include "airspace needed to ensure safety in the takeoff and landing of aircraft"; 49 U.S.C. 40103(a)(1), which states that "[t]he United States Government has exclusive sovereignty of airspace of the United States"; and 49 U.S.C. 40103(a)(2), which states that a "citizen of the United States has a public right of transit through the navigable airspace." At the time *Jankovich* was decided, however, those statutory provisions existed in essentially their current form. And while the municipality's preemption argument in *Jankovich* focused on the Airport Act, see 379 U.S. at 493, this Court stated more broadly that "no substantial claim can be made that Congress intended to preclude such an application of

state law as is involved in the present case," *id.* at 494. That more generic formulation was consistent with the memorandum filed by the United States, which stated (see note 1, *supra*) that "[t]here is no basis for a contention that federal law removes State law restrictions on the exercise of the zoning power or defeats any State law right to compensation." This Court should not lightly conclude that the petitioners, the United States, and the Court in *Jankovich* all overlooked a dispositively preemptive federal statute in addressing a preemption question that was not substantively different from the one presented here. That is particularly so because the statutory provisions that the Court considered in *Jankovich*, unlike the provisions on which petitioner relies, directly address the process by which airport operators acquire property needed for airport construction or expansion or regulate that property to facilitate takeoffs and landings.

In any event, the state-law right of compensation recognized in *Sisolak* and applied in this case does not conflict with the statutory provisions on which petitioner relies. In *Braniff Airways, Inc.* v. *Nebraska State Board of Equalization & Assessment*, 347 U.S. 590 (1954), the Court held that the statutory predecessor to current 49 U.S.C. 40103(a)(1) "was an assertion of exclusive national sovereignty" but "did not expressly exclude the sovereign powers of the states." *Id.* at 595. Rather than defining the boundary between state and federal power, Section 40103(a)(1) declares the sovereignty of the United States, to the exclusion of other *nations*, over the "airspace of the United States." See *Skysign Int'l, Inc.* v. *City & County of Honolulu*, 276 F.3d 1109, 1116 (9th Cir. 2002); *Vorhees* v. *Naper Aero Club, Inc.*, 272 F.3d 398, 404 (7th Cir. 2001).

Nor does the compensation remedy at issue in this case conflict with the statutory right of United States citizens (see 49 U.S.C. 40103(a)(2)) to travel through the navigable airspace. The determination whether particular airspace is "needed to ensure safety in the takeoff and landing of aircraft," 49 U.S.C. 40102(a)(32) (Supp. V 2005), and is therefore part of "navigable airspace" as defined by federal law, necessarily depends on the location of airports and the manner of their operations. The expansion of an existing airport, or the modification of its operations (like the shift from a 20:1 to a 50:1 approach path in this case), will often cause the statutory definition to encompass airspace that was not previously covered. The compensation requirement announced in *Sisolak* pertains to the process by which particular airspace *becomes* part of the "navigable airspace" as a result of changes in airport operations. State-mandated compensation for property taken during that process does not, in and of itself, conflict with the public right of transit through the "navigable airspace" once those changes have been accomplished.

C. Although State-Law Restrictions On Airport Zoning Might Under Some Circumstances Raise Significant Preemption Concerns, This Case Is Not A Suitable Vehicle For Determining The Applicable Limits On State Authority

The Court in *Jankovich* observed that the state court's opinion in that case did "not portend the wholesale invalidation of all airport zoning laws." 379 U.S. at 493. The Court concluded that "no substantial claim can be made that Congress intended to preclude *such an application of state law as is involved in the present case*." *Id.* at 494 (emphasis added). *Jankovich* thus

leaves open the possibility that some state-law restrictions on airport zoning might be so extreme, disruptive, or discriminatory as to create a conflict with federal law. In two respects, the Nevada Supreme Court's decision in *Sisolak* is unclear, but may raise concerns that could (depending on how that court clarifies the applicable state-law standard in subsequent cases) ultimately create substantial preemption questions.

First, the Nevada Supreme Court in *Sisolak* endorsed the trial court's finding that "the presence of aircraft over Sisolak's property at altitudes below 500 feet, as permitted by [petitioner's height-restriction] Ordinances, constituted a permanent physical invasion of his property and was sufficient to establish a taking." 137 P.3d at 1125. That language suggests that the Nevada Supreme Court might find a taking whenever a privately owned tract is subject to recurring overflights at altitudes lower than 500 feet, even in the absence of any diminution of the owner's use and enjoyment of the subjacent land or its value. On the other hand, the court in *Sisolak* repeatedly stressed—including in the passage just quoted—that its finding of a taking depended on the existence of ordinances that both imposed height restrictions and (as the court saw it) affirmatively authorized a physical invasion of the airspace above the height limits as a matter of state law. *Id.* at 1114, 1130. It therefore is unclear whether mere overflights, unaccompanied by such an ordinance, would trigger per se taking analysis under the decision in *Sisolak*. Moreover, whether or not the existence of such an ordinance is a prerequisite to application of *Sisolak*'s rationale, it is unclear what (if any) compensation the Nevada Supreme Court would order in the hypothetical circumstance just posited. But if the state court awarded significant mon-

etary relief based on the fact of overflights alone, without evidence that the overflights had materially reduced the value of the subjacent property, its decision might be viewed as the functional equivalent of a state-law penalty or tax on the operation of the airport. Such a state-law holding would raise significant preemption concerns. Cf. 49 U.S.C. 40116(b) (providing that a State or political subdivision "may not levy or collect a tax, fee, head charge, or other charge" on the transportation of individuals in air commerce).

Second, while holding that Ordinance 1221 effected a per se taking, the Nevada Supreme Court in *Sisolak* observed that, "[l]ike most property rights, the use of the airspace and subadjacent land may be the subject of valid zoning and related regulations which do not give rise to a takings claim." 137 P.3d at 1120 n.25. This passage suggests that the court might not have found a taking if the height limitation had been significantly higher, but less than 500 feet, perhaps on the theory that the airspace above that higher limitation was not "useable" as a practical matter. See *id.* at 1121 (stating that the plaintiff landowner "has a property interest in the useable airspace above his property up to 500 feet"); see also *id.* at 1119. The court also may have left open the possibility that petitioner could have imposed height restrictions upon the plaintiff landowner equivalent to those under Ordinance 1221, without incurring an obligation to pay compensation, if the restrictions were intended to serve purposes other than airport safety. To the extent that comparable height restrictions placed on a near-airport landowner are accompanied by actual overflights that result in a reduction of the property's value beyond that caused by the height restrictions alone, those overflights might provide a valid basis for

distinguishing the affected landowner from a plaintiff whose tract is subject to equivalent height restrictions under a zoning law serving different purposes. But if the Nevada courts were to treat Ordinance 1221 as a per se taking without regard to the occurrence or economic effect of actual overflights above particular tracts, the *Sisolak* rule might be viewed as a form of discrimination against zoning designed to accommodate airport expansion under the federal program, thereby raising significant preemption concerns.

Jankovich therefore need not and should not be read to hold that federal law places *no* constraints on a State's ability to require compensation for airport-related zoning. This case, however, provides an unsuitable vehicle for clarifying the possible limits on state authority. As just explained, it is unclear whether Nevada courts would actually order a monetary payment in the absence of a measure such as Ordinance 1221, or to a plaintiff whose land was subject to Ordinance 1221 but who failed to establish that the airspace through which there were overflights was useable or that any actual overflights had an adverse impact on the property's value. Although the court in *Sisolak* held that proof of recurring overflights at altitudes below 500 feet was sufficient to establish a taking, 137 P.3d at 1125; see *id.* at 1116-1117 (noting that the plaintiff landowner in that case introduced evidence that "approximately 100 planes per day used his airspace at altitudes below 500 feet"), the court also emphasized that just compensation is measured by reference to the value of the taken property, see *id.* at 1128. The Nevada Supreme Court might therefore conclude that, where recurring overflights do not affect the value of the subjacent land, the just compensation owed is zero. See *Brown* v. *Legal Found.*, 538

U.S. 216, 235-236, 240 (2003) (explaining that, because "the 'just compensation' required by the Fifth Amendment is measured by the property owner's loss rather than the government's gain," no compensation is owed for a per se taking that causes no pecuniary harm to the property owner).

In any event, this case does not present the question whether compensation for overflights could appropriately be ordered absent proof of actual economic harm. The district court found that respondents had "shown that the increased frequency of flights of large general aviation aircraft over [their] property * * * directly, substantially, and immediately interfered with the enjoyment and use of [their] property," Pet. App. 54a, and the court calculated the amount of just compensation owed by determining the extent to which Ordinance 1221 had reduced the value of the subjacent land, see *id.* at 27a, 32a. Although the court of appeals remanded the case for recalculation of damages, the Ninth Circuit likewise emphasized that "just compensation is measured by the fair market value of the condemned property," which is "determined by reference to the highest and best use for which the land is available" so long as that use is "reasonably probable." *Id.* at 22a-23a (quoting *Sisolak*, 137 P.3d at 1128). Petitioner is therefore wrong in seeking to distinguish *Jankovich* on the ground that "the *Jankovich* property owner asserted a traditional takings claim—*i.e.*, that a zoning restriction deprived it of the use of its land"—whereas respondents "were compensated for loss of a state law right to exclusive ownership of all navigable airspace up to 500 feet above their land." Pet. 24, 25. Because the compensation award in this case was premised on evidence of a substantial diminution in the value of petitioner's tract, and because the

amount of the award is to be calculated by reference to that diminution, the rationale for takings liability here is not fundamentally different from the landowner's theory in *Jankovich*.

Finally, although petitioner asserts that the compensation requirement announced in *Sisolak* will have particularly disruptive effects on the national aviation system, petitioner's legal theory does not turn on the *extent* of the economic impact that the challenged state-law rule can be expected to entail. Rather, petitioner argues that States have *no* authority to require compensation for height restrictions or associated overflights that do not effect a federal-law taking. The Court in *Jankovich* unequivocally rejected that proposition, and there is no need for the Court to revisit that holding now.

D. Petitioner Has Failed To Demonstrate That The State-Law Compensation Requirement Applied In This Case Will Disrupt The Federal Aviation Regime

Petitioner contends that the state-law rule applied by the Ninth Circuit in this case will disrupt the national aviation system by (1) creating financial disincentives to airport expansion and improvement (Pet. 19-22) and (2) granting subjacent landowners a right to "exclude" others from the navigable airspace (Pet. 18, 26, 29). Those arguments provide no basis for finding preemption in this case.

1. The federal statutory scheme does not suggest that States are categorically preempted from imposing financial prerequisites to airport construction or expansion that go beyond those contained in the federal Constitution. See *Jankovich*, 379 U.S. at 494. Under the federal regime, airport operators may use both "zoning" (49 U.S.C. 47107(a)(10)) and the acquisition of "property

interests in land or airspace" (49 U.S.C. 47110(c)(1)) to ensure that nearby property is not used in a manner that impedes airport operations. In administering federal airport funding programs, the FAA encourages airport operators to reduce costs by relying to the maximum permissible extent on uncompensated zoning, rather than on the acquisition of fee or easement interests, to prevent hazards to airport operations. See, *e.g.*, *FAA, U.S. Dep't Transp., Order 5100.38C, Airport Improvement Program Handbook* para. 701(b)(2), at 122 (June 28, 2005) <http://www.faa.gov/airports_airtraffic/airports/resources/publications/orders/media/aip_5100_38c.pdf> (explaining that, in approach and transitional zones outside the Runway Protection Zone, "[u]nless there is a need for the land for future development or noise compatibility purposes, sponsors should be encouraged to acquire the minimum property interest necessary to assure safe aeronautical use"). The FAA has issued a model zoning ordinance for possible enactment by local airport operators, which states that the prevention of obstructions to air traffic "should be accomplished, to the extent legally possible, by the exercise of the police power without compensation." *FAA Advisory Circular No. 150/5190-4A, A Model Zoning Ordinance to Limit Height of Objects Around Airports* App. 3, at 1 (Dec. 14, 1987) <http://www.faa.gov/airports_airtraffic/airports/resources/advisory_circulars/media/150-5190-4A/150_5190_4A.pdf> (*FAA Advisory Circular No. 150/5190-4A*).

The FAA has recognized, however, that a local airport operator's ability to use zoning for these purposes may be constrained by state and local law as well as by the Just Compensation Clause of the federal Constitution. Some local governmental bodies that operate air-

ports, for example, lack the legal authority to engage in zoning or otherwise to restrict the uses of nearby off-airport property. Although the FAA encourages airport operators to make the maximum permissible use of whatever zoning authority they possess, and to adopt the model zoning ordinance (or some variant thereof) if it is within their power to do so, the agency has not taken the view that such state- or local-law limitations on an airport operator's zoning power are preempted by federal aviation statutes. To the contrary, the FAA's guidance appears to contemplate a diversity of state and local zoning and property-rights regimes. And the model zoning ordinance issued by the FAA cautions that "[a]ny height limitations imposed by a zoning ordinance * * * should not be so low at any point as to constitute a taking of property * * * *under local law*." *FAA Advisory Circular No. 150/5190-4A* para. 5.d at 3 (emphasis added).

To be sure, the existence of a state-law regime requiring compensation for what federal law would deem a permissible and non-compensable regulation may sometimes cause airports to be located in relatively inconvenient venues, away from otherwise valuable property. Much of the inconvenience of that state determination, however, will be visited locally. And, while there may be preemption in certain cases, see pp. 13-16, *supra*, the federal statutory and regulatory scheme appears to contemplate variations among local property-rights regimes.

In addition, FAA guidance to airport operators specifically contemplates that state laws governing the acquisition of land may sometimes require payments that exceed federal requirements:

> State law may require a Sponsor to include with its market value appraisal, additional compensation for items required under state law. It is FAA policy that these costs exceed entitlements prescribed in Title 49 CFR, Part 24. Items generally held to be non-compensable in eminent domain include loss of business, payment for goodwill, frustration of development plans, and other limitations described in the *Uniform Appraisal Standards for Federal Land Acquisitions* as ineligible for Federal reimbursement. The Sponsor's review appraisal report must identify such items separate from the appraised market value for the acquired real property.

FAA Advisory Circular No. 150/5100-17, Land Acquisition and Relocation Assistance for Airport Improvement Program (AIP) Assisted Projects Ch. 2-6, at 15 (Nov. 7, 2005) <http://www.faa.gov/airports_airtraffic/airports/resources/advisory_circulars/media/150-5100-17/150_5100_17_chg6.pdf> (*Advisory Circular*). That *Advisory Circular* thus recognizes that state law governing land acquisition for airport or other public purposes sometimes requires payment for items that, under federal standards, would be "non-compensable in eminent domain." *Ibid.* Rather than suggesting that such state-law requirements are preempted, however, the *Advisory Circular* simply warns that the additional expenditures are "ineligible for Federal reimbursement." *Ibid.* Although the *Advisory Circular* does not specifically address the acquisition of airspace or the imposition of height restrictions to prevent obstacles to the safe takeoff and landing of aircraft, the guidance it provides is inconsistent with any categorical argument that the federal regime preempts all state-law compensation

requirements that increase the cost of airport expansion above the federal constitutional minimum.

2. Petitioner errs in describing the decision in *Sisolak* as recognizing a right of subjacent landowners "to exclude the public from navigable airspace." Pet. 18; see Pet. 26, 29. In neither *Sisolak* nor this case did the plaintiffs seek an injunction that would *prevent* overflights through the airspace above their tracts. Rather, the plaintiffs in both cases sought *compensation* for height restrictions and associated authorization of overflights, based on evidence of diminution of the value of their lands. The Nevada Supreme Court evidently saw no contradiction between the provision of a monetary remedy and the proposition (which the state court unequivocally accepted) that airplanes traveling over the plaintiff's property "may fly below 500 feet when necessary for takeoff and landing." *Sisolak*, 137 P.3d at 1119. The state court's recognition that a landowner has a property interest in usable airspace up to 500 feet, moreover, does not distinguish this case from *Jankovich*, where the Indiana Supreme Court likewise held that the plaintiff landowners "did have a protected property interest in the airspace above their land." 379 U.S. at 490.

For purposes of the preemption question presented here, the relevant question is whether the state-law *compensation* requirement actually enforced in this case disrupts the federal aviation regime, not whether recognition of a landowner's property interest in the superjacent airspace could as a theoretical matter imply a right to exclude. That pragmatic approach is especially appropriate because the basis for federal jurisdiction in this case was the bankruptcy power. The function of the courts below therefore was to supervise the division of

the bankruptcy estate—not to pass on any question concerning the potential further implications of the state-law right recognized in *Sisolak*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

D.J. GRIBBIN
General Counsel

PAUL M. GEIER
Assistant General Counsel for Litigation

DALE C. ANDREWS
Deputy Assistant General Counsel for Litigation

KERRY B. LONG
Chief Counsel

MARC WARREN
Deputy Chief Counsel for Operations Federal Aviation Administration Department of Transportation

PAUL D. CLEMENT
Solicitor General

RONALD J. TENPAS
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

MALCOLM L. STEWART
Assistant to the Solicitor General

KATHERINE J. BARTON
KATHRYN E. KOVACS
Attorneys

MAY 2008